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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 145

DALTON TELEPHONE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petitioner, Dalton Telephone Company, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision of said court rendered on the 20th day of March, 1951 (R. 191), and based upon a written opinion by that court rendered on the same day, but which judgment only became final on the 25th day of May, 1951 (R. —), when, after a motion for reconsideration filed by petitioner was denied by said Circuit Court of Appeals on the 7th day of May, 1951 (R. 217), the final decree of said court was entered (R. —).

This Court has jurisdiction to review said decision under Section 1254, Title 28, U. S. Code Annotated.

I

Summary Statement of the Matters Involved

On the 30th day of December, 1946, Southern Federation of Telephone Workers filed with the National Labor Relations Board, respondent here, a charge alleging the Dalton Telephone Company, now petitioner, to be engaged in unfair labor practices within the meaning of Section 8, subsections 1 and 3 of the National Labor Relations Act (R. 10). On the 13th day of March, 1947, the Southern Federation of Telephone Workers filed with respondent an amended charge, revealing affiliation with the National Federation of Telephone Workers and alleging additional unfair labor practices within the meaning of Section 8, subsections 1, 3 and 5 of the National Labor Relations Act (R. 12). On the 14th day of August, 1947, the Southern Federation of Telephone Workers, revealing the same affiliation, filed a second amended charge alleging respondent to be guilty of certain unfair labor practices within the meaning of Section 8, subsections 1, 3 and 5 of said Act (R. 14). On the 25th day of March, 1948, the Southern Federation of Telephone Workers, revealing the same affiliation, and no other, filed a third amended charge against respondent in which it charged respondent with certain unfair labor practices within the meaning of Section 8(a), subsections 1, 3 and 5 of the National Labor Relations Act (R. 17). As a part of said third amended charge the following was alleged:

> "4. Each of the officers of the Union has executed a non-communist affidavit as required by Section 9(h) of the Act.
>
> 5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9 (f), (g) and (h) of the Act".

On the 26th day of March, 1948, respondent served notice of a hearing and a complaint based upon said charges upon petitioner in the matter of "Dalton Telephone Company and Southern Federation of Telephone Workers" (R. 20-28).

Petitioner filed its answer to the complaint (R. 29) in which it denied the allegations of unfair labor practice (R. 29). For further answer petitioner alleged that after recognizing the Union and during bargaining process it had bargained for registration by the Union as provided by Sections 22-409 to 22-414 inclusive of the Code of Georgia so as to render the Union competent to contract and be contracted with under State as well as Federal law, as was petitioner (a simple mode of registration prescribed by a Georgia law of 1805, and made applicable to all unincorporated societies and associations by Acts of the Legislature in 1855). Said law merely requiring that, in order that such societies or associations may own property, plead and be impleaded, contract and be contracted with, "such society shall have entered the names of its trustees or officers and shall have recorded its name, style and objects" as provided in said law). Exhibit "B" to the answer consists of a copy of the proposed contract conceded to have been insisted upon by the Union, Article 6, Section 1 of which is as follows:

> "If any provisions of this agreement or any amendments thereto, or any of the applications of the provisions of this agreement to any person or circumstances are held invalid by any Federal or State Law of the final determination of any Court or authority of competent jurisdiction, the remainder of this Agreement or its amendments or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby." (R. 45.)

It was further alleged that said provisions of the Georgia law are reasonable and valid requirements which petitioner had the right to insist upon as affording to it the same measure of protection as the Union insisted upon in its proposals (R. 38, 39).

The matter was duly heard before a Trial Examiner who filed an intermediate report in which he held that petitioner had not violated any provisions of the National Labor Relations and Management Acts, and that petitioner was not guilty of bad faith in contending that it should have the right equal with the Union to submit a dispute concerning an interpretation or an alleged breach of the contract to the courts (R. 112), and that

> "the filing of such a registration certificate imposes no obligation upon the Union to change its organization structure. It only requires the payment of a nominal filing fee. Therefore, it appears that compliance with Respondent's proposal would neither be unreasonable nor unduly burdensome to the Union." (R. 114.)

After exceptions filed by the United States of America (R. 61, 64) the National Labor Relations Board, on the 12th day of April, 1949, upheld the finding of the Examiner as to the dismissal of one employee for insubordination, but reversed the finding of such Examiner as to all other matters, and entered an order accordingly (R. 68-81).

Neither did the Examiner nor did the National Labor Relations Board hear any proof or make any findings as to whether or not the officers of the Southern Federation of Telephone workers or the National Federation of Telephone Workers had executed a non-communist affidavit as required by Section 9(h) of the National Labor Relations Act and as was alleged in the third amended charge of the Union. Nor was any evidence heard as to the truth of the allegations of affiliation.

On March 18, 1950, the Respondent filed its petition against Dalton Telephone Company with a transcript of the record (R. 1) in the United States Court of Appeals for the Fifth Circuit praying a decree of that court enforcing the order of the Board.

On the 8th day of November 1950 a supplemental transcript of record was filed in the Fifth Circuit Court of Appeals in said matter which consist of a copy of a proceeding filed before the National Labor Relations Board on September 13, 1950, and served upon counsel for petitioner on said date, in which it was alleged by *the Southern Division 49 Communications Workers of America, CIO, that the Southern Federation of Telephone Workers no longer exists and that it had not existed since June 8, 1947 (R. 123), and that at all times since said date its successor Southern Division 49 Communications Workers of America, CIO, has exercised such rights as Southern Federation of Telephone Workers may have had,* and it claimed to be entitled to all the benefits of any contracts and rights the Southern Federation of Telephone Workers may have had.

Said supplemental record revealed that the Dalton Telephone Company, now Petitioner, filed its response to said motion to amend said decision and order (R. 159) in which it alleged that the cause was then pending before the Court of Appeals for the Fifth Circuit and that the National Labor Relations Board was without jurisdiction, unless the petition for enforcement should be withdrawn from said Court of Appeals. In said response also it was specifically alleged that neither the Southern Federation of Telephone Workers nor the Communications Workers of America, CIO, nor the Dalton Local of the charging Union were, at the time of filing the charges on which the complaint was based, or at the time of issuance

of the complaint, in compliance with the requirements of Section 9 (f), (g) and (h) of the National Labor Relations Act, and petitioner requested the withdrawal of the proceeding from the Fifth Circuit Court of Appeals so that such pertinent issues of fact might be determined by the Board (R. 159).

Said supplemental record shows that on the 23rd day of October, 1950, the motion to amend the order and decision was denied by the N.L.R.B. upon the ground that the matter was pending in the Fifth Circuit Court of Appeals (R. 163).

On the 15th day of November, 1950, petitioner filed in the United States Court of Appeals for the Fifth Circuit a motion to remand the proceedings to the National Labor Relations Board with direction to that Board to reopen the record for the purpose of receiving additional evidence with respect to the identity, authority, and existence of the labor organizations involved, and, for redetermination of the status of each organization, respecting compliance with the requirements of Section 9 (f), (g) and (h) of the National Labor Relations Act as amended (R. 166). In said motion the facts disclosed by the supplemental record were pointed out to the court, and correspondence with N.L.R.B. attached (R. 171).

In said motion Dalton Telephone Company alleged that at no time during the course of the hearing, or at any time thereafter until subsequent to the filing of the petition for enforcement was it apprised of the facts constituting the basis of such motion. Furthermore, it alleged that it was misled by the Board when it permitted the filing of amended charges by an organization which the Board knew had ceased to exist, and further that the amended charges did not reveal, but concealed the identity and the successorship relied on (R. 167).

On January 8, 1951, National Labor Relations Board filed its opposition to the motion to remand the proceedings to the National Labor Relations Board, in a six line manuscript, and with disdain, set forth its grounds in opposition in a brief attached to said response (R. 190). In said brief N.L.R.B. asserted (a) that N.L.R.B. had made an administrative determination that the Union was in compliance with Section 9 (f), (g) and (h) of the Act at all critical times; (b) The Board cannot be required to litigate its findings as to compliance by a labor organization; (c) That an employer has no right to litigate the question of compliance and (d) the issue presented by the motion was waived.

On the 28th day of November, 1950, Dalton Telephone Company, now Petitioner, filed its response and answer and cross-complaint, to the petition for enforcement of the order of the National Labor Relations Board in said Court of Appeals (R. 182) in which it was alleged that the decision and order of the Board are contrary to law for reasons therein stated and in which specific attacks were made upon the constitutionality of the National Labor Relations Act of 1935 as amended by Labor Management Relations Act of 1947. Said specific attack being contained in paragraph 11 of said response and answers in words and figures as follows:

> "11. Respondent shows that the Decision and Order of the Board were issued pursuant to portions of the National Labor Relations Act of 1935 as amended by the Labor Management Relations Act of 1947 (Title 29, U.S.C.A., particularly Sections 153 (a), 160 (a) and (e)), which contravene Article I, Sections 1, 2 (Clause 5); Article I, Section 3 (Clause 6); Article I, Section 8 (Clause 9); Article III, Sections 1 and 2; Article II, Section 1, and the Fifth Amendment of the Constitution of the United States.

The provisions of said Act, under which said Board acted, contravene said provisions of the Constitution, to the injury of Respondent, and are void for the following reasons, among others:

(1) This case is one arising under the laws of the United States and is also a controversy to which the United States is a party within the meaning of Article III, Section 2, of the Constitution, concerning which the Board, with precarious tenure in office, has exercised judicial powers in violation of Article III, Sections 1 and 2 of the Constitution, and in violation of Article I, Sections 1, 2, 3 and 8 of the Constitution, which limit the power of Congress to constitute any tribunal exercising judicial power, except tribunals inferior to the Supreme Court, whose members are removable only by impeachment under the power of the Senate to try such impeachment, and whose members enjoy non-precarious tenure. Consequently, Respondent has been deprived of its constitutional right to have its case decided by a tribunal or body emancipated from control or influence either by the executive or the legislative branch of government.

(2) Said Act is an unconstitutional invasion of the judicial branch of the government by the legislative branch of the government in that the duties imposed upon the judiciary under the provisions of Section 160, Title 29, U.S.C.A., as to its review of the findings of fact made by the Board, whose members hold office by precarious tenure, deprives the judiciary of non-delegable powers conferred upon it by Article III, Sections 1 and 2, of the Constitution and imposes administrative or executive duties upon said court in violation of Article II, Section 1, of the Constitution, which invests the executive power in the President of the United States, and Article III, Section 1, which invests only judicial power in the judiciary. Furthermore, the Judiciary is unconstitutionally deprived of its power to apply the law to the facts as they exist, and is required to apply the law only to the 'findings of the Board.'

(3) The Decision and Order of said Board in this case deprives the Dalton Telephone Company of its liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and the same is therefore a nullity and is absolutely void for the following reasons:

(a) Said decision and order was rendered by a tribunal whose members hold their offices for a fixed term of years, under appointment by the President of the United States, with the advice and consent of the Senate, who may remove them with the advice and consent of no one, and who may reappoint at his pleasure with the advice and consent of the Senate, thus rendering said Board, exercising judicial powers, servile to the executive and legislative branches of government, in violation of the due process of law and the law of the land as established by the common law of England, the American Colonies and the American States prior to the adoption of the Fifth Amendment, at which time it was an essential of the law of the land and due process that no one's liberty or property should be taken away by the decision of any non-jury tribunal except one whose members held their offices independent of the executive power of government either by tenure during good behavior or tenure determinable by the elective franchise of the people, as well as independent of the legislative branch of government by having the amount of their compensation fixed beyond the power of such branch to diminish during their tenure.

(b) Said National Labor Relations Board, whose members hold office by precarious tenure, exercised judicial power in this case both as to law and facts as a result of which Respondent has been or will be deprived of its liberty and property without due process of law and in violation of the law of the land, in that at the time of the adoption of the Fifth Amendment to the Constitution of the United States and now it was and is an essential of the law of the land and due process, that all questions of fact litigated be-

tween government and men be decided either by an indifferent Judge or tribunal, independent of control or influence by the executive branch of government, or by an impartial jury beyond control or influence by any power of government either legislative or executive." (R. 186)

The United States Court of Appeals for the Fifth Circuit, Honorable R. L. Russell, Circuit Judge, dissenting, decreed that the order of the Board be enforced, denied Respondent's motion to remand the proceeding to the Board for further findings, and ignored the grave constitutional issues raised by the response and answer of Dalton Telephone Company.

After said decision petitioner filed a motion for reconsideration, and again insisted on its right to have the constitutional issues determined in the case and insisted upon reconsideration of other issues made in the case and found adversely to your petitioner (R. 196). Said motion was supplemented by an extraordinary tender by counsel of copies of original historical records throwing new light on the meaning of the *Tribunal Clause* of the Constitution (R. 213). With disdain all was ignored and the motion denied, Russell, dissenting (R. 217).

II

Questions Presented for Consideration by This Court

1. Where a party relies on the integrity of the National Labor Relations Board and the verity of its proceedings, and where such Board files a complaint against such party in the name of a Union that has ceased to exist, such complaint being based upon charges which affirmatively aver the existence of such non-existing Union, and compliance by the officers of such non-existing Union with the non-communist affidavit provisions of Section 9 (h) of the

National Labor Relations Act, and where it further avers that its affiliate has also complied with Sections 9 (f), (g) and (h) of the Act; and where at the time such complaint was filed such averments were false, and the National Labor Relations Board knew such averments to be false, does the reliance by such party upon such falsehoods constitute "reasonable grounds for the failure to adduce such evidence in the hearing before the Board" within the meaning of Section 10 (e) of the National Labor Relations Act, and will such reliance constitute a waiver by such person of the rights accorded to him by Section 10 (e) of the Act to apply to the court for leave to adduce additional material evidence upon such vital issues?

2. Does the Constitution of the United States and particularly the due process clauses of the Fifth and Fourteenth Amendments entitle a party affected by legislative action, such as that embodied in the National Labor Relations Act of 1935 as amended by the Labor Management Act of 1947, to a judicial review of specific questions as to whether such party has been thereby deprived of a right protected by the Constitution?

3. Since the National Labor Relations Board is a tribunal, and since it has exercised a part of the judicial powers of the United States in this case in making findings of fact, binding upon the disputants, in a case arising under the laws of the United States and in a controversy to which the United States is a party, within the meaning of Article 3, Section 2 of the Constitution; and since the members of said Board hold their offices with precarious tenure, and pay subject to the vagaries of legislative will, being removable by the President, under and by virtue of the specific provisions of the National Labor Relations Act of 1935 as amended by the Labor Management Act of 1947 (Title 29, USCA Sections 153(a), 160(a) and (e)), do the provisions of said Act, under which said Board

acted in this case, contravene Article 1, Sections 1, 2 (Clause 5); Article 1, Section 3, (Clause 6); Article 1, Section 8, (Clause 9); Article 3, Sections 1 and 2 of the Constitution, and has the petitioner been deprived of its constitutional right to have its case tried, in all of its phases by a tribunal emancipated from control or influence by either the executive or legislative branches of government?

4. Does the Congress have the power to nullify the *Tribunal Clause* of the Constitution embodied in Clause 9 of Section 8 of Article 1, so as to enable it to create and authorize tribunals to perform vital judicial functions in the administration of justice, without giving to the members of such tribunals tenure during good behaviour and undiminishable pay, and so as to render such tribunals servile to executive and legislative powers without, at the same time, violating Article 3, Sections 1 and 2 of the Constitution?

5. If it should be determined that there inheres in the *Commerce Clause,* the *Necessary and Proper Clause,* or in some other provision of the Constitution, a death warrant for the *Tribunal Clause,* or if it should be held that the Congress has undefined powers, independent of those conferred upon it by the Constitution, which may be used to destroy defined limitations imposed upon it by the Constitution, may it impose upon the emancipated judiciary, shielded by Article 3 of the Constitution, a duty to participate in the executive, or legislative, or administrative functions of agencies made servile to executive and legislative will, by forcing the emancipated judiciary to use its processes to enforce the orders of such an agency based upon findings of fact which the emancipated judiciary may not review or modify if supported by any substantial evidence in the record made before such agency?

6. Does the decision and order of the Board in this case, as enforced by the decree of the Court of Appeals, deprive the petitioner of its liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States for any of the following reasons:

(a) Said decision and order was rendered by a tribunal whose members hold their offices for a fixed term of years, under appointment by the President of the United States, with the advice and consent of the Senate, who may remove them with the advice and consent of no one, and who may reappoint at his pleasure with the advice and consent of the Senate, thus rendering said Board, exercising judicial powers, servile to the executive and legislative branches of government, in violation of the due process of law and the law of the land as established by the common law of England, the American Colonies and the American States prior to the adoption of the Fifth Amendment, at which time it was an essential of the law of the land and due process that no one's liberty or property should be taken away by the decision of any non-jury tribunal except one whose members held their offices independent of the executive power of government either by tenure during good behavior or tenure determinable by the elective franchise of the people, as well as independent of the legislative branch of government by having the amount of their compensation fixed beyond the power of such branch to diminish during their tenure.

(b) At the time of the adoption of the Fifth Amendment was it an essential of the law of the land and due process, that all questions of fact litigated between government and men be decided either by an indifferent judge or tribunal, emancipated from control by the executive branch of gov-

ernment, or by an impartial and indifferent jury emancipated from control by any branch of government?

7. Was the Dalton Telephone Company deprived of due process of law as embodied in the Fifth and Fourteenth Amendments by the action of the Circuit Court of Appeals of the Fifth Circuit in denying its motion to remand said proceedings to the National Labor Relations Board for the taking of further evidence on the questions as to compliance by the charging Union with Section 9 (f), (g) and (h) of the National Labor Relations Act at the time the complaint was issued, and other material times, when it is admitted in the record that the National Labor Relations Board made such administrative determination *ex parte;* and no proof of said determination or the grounds upon which the same was based was introduced into the record, except the bare assertion of counsel?

8. Was the Dalton Telephone Company deprived of due process of law by the Fifth Circuit Court of Appeals when it denied its motion to remand the proceedings to the National Labor Relations Board for the purpose of hearing evidence on the vital issues as to the existence of the charging Union, and as to successorship of one Union to another at all relevant times, when it is alleged in the charges and amended charges attached to the complaint that in December 1946 the Southern Federation of Telephone Workers was not affiliated with any other Union; that in March 1947 it was affiliated with the National Federation of Telephone Workers; that it was likewise affiliated in August 1947 and in March 1948; whereas, it appears without dispute from the admissions of the National Labor Relations Board that the Southern Federation of Telephone Workers no longer existed after June 8, 1947, and that Southern Division 49, CIO, became the successor to

the Southern Federation of Telephone Workers; and that the National Labor Relations Board, with knowledge of all the facts, and without informing petitioner thereof, proceeded to invoke processes of the judiciary in the name of Southern Federation of Telephone Workers, after having administratively determined that said organization was no longer in existence and that it had been succeeded by an entirely separate and distinct organization?

9. If petitioner was not deprived of its constitutional rights under the facts stated in either of the two questions next preceding this question, was it deprived of its statutory rights under Title 29, Section 160(e), U.S.C.A.?

10. If petitioner was not deprived of its constitutional rights under the second and third questions next preceding this question, and was not deprived of any legal right under the facts stated in said questions, and question 9, did the Fifth Circuit Court of Appeals abuse its discretion in refusing to remand the proceedings to the National Labor Relations Board in order to afford to petitioner an opportunity to be heard both upon the issue as to compliance by the Union as to non-communist affiliation, and the issue as to the legal existence of the charging Union and the legality of the asserted successorship?

11. Did the court err in failing to give any consideration whatsoever to the findings of fact and conclusions of law of the Trial Examiner, in determining whether or not the findings of fact and conclusions of law of the Board was supported by substantial evidence on the record considered as a whole?

12. Did the court err in holding that the National Labor Relations Board was authorized to find petitioner guilty of an unfair labor practice in failing to bargain in good faith with the charging Union where it appears that the

bargaining Union proposed and insisted upon the insertion of a provision in the contract contemplating the use of the processes of Georgia State Courts, and where it appears that in order for said bargaining Union to validly contract or be contracted with, or to plead or be impleaded in the Courts of Georgia, it became necessary under Georgia law for the Union to file with the Clerk of some Superior Court in Georgia a statement revealing the identity of its officers with its name, style and objects as provided by the Georgia law; and where it appears that petitioner bargained over an extended period of time and substantially agreed upon all essential matters except the filing of such information with some Clerk, which the bargaining Union refused to do?

13. If it should be found that the Fifth Circuit Court of Appeals did not err under the facts stated in the next preceding question, did it err in so holding where it appears, independent of such statute, that Georgia courts hold that after the execution of a contract by an unregistered association, with a party able to plead and implead, and after the parties have entered into the performance of the contract, the unregistered association may at any time bring suit thereon, by perfecting its registration before entering such suit, while the opposite party may not take any action to require the unincorporated association to register for the purpose of being made a party defendant, and is estopped to deny the validity of the contract?

14. Where it affirmatively appears that compliance with said Georgia registration statute would have served to reveal the true facts as to the actual existence of a Union seeking a contract, is it bad faith for an employer to bargain for compliance, when it later appears that the Union wilfully concealed, to the hurt of the employer, the very facts registration would have disclosed?

III

Reasons for the Allowance of the Writ of Certiorari

The serious and vital matters involved in the questions heretofore stated are reasons relied on for the allowance of this writ of certiorari.

In this case the Circuit Court of Appeals has rendered a decision that conflicts with the decision of other Circuit Courts of Appeals and also with a decision of the Fifth Circuit Court of Appeals. In this case it has decided an important question of local law in conflict with applicable local decisions; and has decided an important question of federal law which has not been, but should be settled by this Court; and has decided a federal question in a way probably in conflict with applicable decisions of this Court; *and has so far departed from the accepted and usual course of federal proceedings, and so far sanctioned such a departure by a lower tribunal, as to call for an exercise of this Court's power of supervision.* Furthermore, it not only denied to petitioner its substantive rights under the Constitution, but denied to petitioner its procedural rights under the Constitution.

WHEREFORE, your petitioner, upon this petition, and upon the annexed brief, and upon a certified transcript of the record of all proceedings in the Circuit Court of Appeals for the Fifth Circuit, prays that a writ of certiorari be issued by the court to the end that such may be reviewed and determined by the court as provided by law and as guaranteed by the Constitution of the United States, and that upon such review the said judgment of said Court of Appeals be reversed and that this Court direct such further proceedings as may be proper in the premises.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 145

DALTON TELEPHONE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Jurisdiction

The date on which the judgment sought to be reviewed became final was the 25th day of May, 1951, after a motion for reconsideration was overruled on May 7th, 1951 (R. 217).

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254 U. S. Code Annotated and Rule 38 of the Supreme Court rules.

II

Statement of the Case

The accompanying petition for the writ of certiorari briefly and concisely states the relevant facts and issues.

III

Specifications of Errors

The statement of questions presented for consideration by this Court in the accompanying petition constitutes an adequate specification of errors.

The errors complained of are errors both of commission and omission. The following portion of this brief containing the argument will discuss the specific errors.

IV

Argument

Question 1

In holding that there was "no basis" for petitioner's motion to remand the proceeding to the National Labor Relations Board for further findings of fact and that the same should be denied, the Circuit Court of Appeals necessarily held that by relying upon the integrity of the National Labor Relations Board and the verity of its proceedings, petitioner had waived its right to a hearing on the vital issue as to whether or not, at the time the complaint was filed in such court, the charging Union was in compliance with the non-communist provisions of the National Labor Relations Act. Its ruling could have been based on no other ground because the same court had held in *Labor Board* v. *Postex Cotton Mills*, 181 F. 2d 919, that such a question was a vital one and was justiciable. That ruling now

carries the sanction of this Court. See *NLRB* v. *Highland Park Manufacturing Company,* No. 425, decided by this Court May 14, 1951, — U. S. —:

> "An issue of law of his kind which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal".
>
> *NLRB* v. *Highland Park Mfg. Co., supra.*

If the motion to remand lacked some nicety of form (which we are unable to find) still the record before the court disclosed without dispute that no compliance with the requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, was in effect at the vital and necessary periods required by the law (R. 168, 169, 172, 174, 177, 178). Certainly the motion had the effect of suggesting the demise of the Union in whose name the complaint was proceeding and, of its own motion, the court should have made inquiry as to the validity of the successorship before proceeding to order petitioner to bargain with a Union which the National Labor Relations Board and the Fifth Circuit Court of Appeals knew was not in existence.

QUESTION 2

When an order of the National Labor Relations Board becomes a subject for review by a Circuit Court of Appeals "all questions of constitutional right or statutory authority are open to examination by the court".

NLRB v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 47.

> "Any party affected by . . . legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution".
>
> *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 661.

Question 3

Question No. 3 was clearly raised in this case, and was just as clearly ignored by the Fifth Circuit Court of Appeals. It has surprising novelty. The annotations of Clause 9 of Section 8 of Article 1 of the Constitution, in Shepard's United States Citations cites only two cases of the Supreme Court of the United States in which said clause is discussed. Those cases being as follows: 62 U. S. 338 (which does not refer to Clause 9 and which should have been annotated under Clause 8), and *Downs* v. *Bidwell,* 182 U. S. 363, where the clause is mentioned in passing.

This question is the "open question" posed by members of this Court in *National Mutual Insurance Company* v. *Tidewater,* 337 U. S. 582, 644, 69 Supreme Court 1173, 1209, where it is said:

> "It is at least open to question, . . . whether all of the subjects of Article 3 judicial power, or only federal question jurisdiction may be transferred to legislative courts, within the States", "for the purpose of emasculating" the judiciary.

The principal provisions of the Constitution relating to the question are as follows:

> *Article 1, Section 1*—"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives. . . .
>
> *Section 2*—. . . The House of Representatives shall have the sole power of impeachment.
>
> *Section 3*—. . . The Senate shall have the sole power to try all impeachments.
>
> *Section 8*—The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court; . . .
>
> *Article 2, Section 1*—The executive power shall be vested in a President of the United States of America. . . .

Article 3, Section 1—The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office".

Section 2—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizen thereof, and foreign States, Citizens or Subjects. . . ."

The word "tribunal" is defined by Webster as follows:

"The seat of a judge; the bench on which a judge and his associates sit for administering justice. Hence, a court or forum of justice; a person or body of persons having authority to hear and decide disputes so as to bind the disputants; as, the Supreme Court is the highest tribunal of the United States".

The word "court" is defined by the same authority in part as follows:

"The persons duly assembled under authority of law for the administration of justice, whether specifically appointed to exercise only judicial powers, as most modern courts, or combining judicial with legislative powers, as often formerly, and still in some

> cases, as that of the British Parliament, the legislature of Massachusetts, etc.; an official assembly legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes. A tribunal established for the administration of justice."

It thus appears that the clause giving Congress the power to constitute tribunals defined the kind of tribunal by specifically providing that such tribunals must be "inferior to the Supreme Court." Article 3 then vests the judicial power of the United States in the Supreme Court and "in such inferior courts as the Congress may from time to time ordain and establish" under Article 1, Section 8.

If the *Commerce Clause* carries a death warrant for the *Tribunal Clause,* and the *Necessary and Proper Clause* is its scaffold, then, like decent hangmen, let us hearken to the victim's last words before we spring the trap.

The history of the judiciary provisions of the Constitution reveal conclusively that the framers of the Constitution meant exactly what they wrote into the Constitution.

> See, *Colonial and Constitutional History of the Emancipated Judiciary in America, American Bar Association Journal, July issue 1951, and citations; George Mason and the Rights of Men, Georgia Bar Journal, May issue 1951.*

The case of *Downes* v. *Bidwell, supra,* is one in which the Supreme Court labored mightily to respect John Marshall's opinion in the *Canter* case (1 Peters 511) and still keep its own. Whether it succeded in either, is extremely doubtful. To understand the *Canter* case, it must be bracketed in contemporary history. We must evaluate the overwhelming assaults made upon the tenure of Judges by the powers of the purse and sword during the decade preceding the *Canter* decision, and we must also evaluate like as-

saults upon the integrity of the judiciary itself during two decades preceding that decision. Under those furious assault, John Marshall cringed for the first time, and breached the Constitution to purchase a little time. The tenure of territorial judges was sacrificed to expediency—the first refuge of a coward and the last of a patroit. John Marshall was a patriot.

The American Revolution repudiated the doctrine that colonists or territorial residents are not entitled to the fundamental rights of domestic citizens, the most fundamental of which is the right to have one's case or controversy tried before an emancipated tribunal. The Northwest Ordinance of 1787 gave an emancipated judiciary to the Northwest Territory while the Constitutional Convention was in Session. The framers of the Constitution did not deny to others that which they fought a bitter war to acquire for themselves.

Like George III, some historians and some Judges have worried unseemly about the peculiar status of territorial judges. That did not worry the framers of the Constitution. If territorial status should end in Statehood, emancipated judges would be there and there would be no *hiatus* in the flow of justice under law. If territorial status should end in some other unforeseeable manner, their tenure would still stand, but their "compensation" was made dependent upon "services" by Article 3. Thus the public purse was protected from sinecures.

From our failure to take the advice of George Mason and recur frequently to "fundamental principles" we have fallen into confusion when considering the judiciary in connection with *limitation of powers*. The "fundamental" is that the legislative makes the law, the executive executes the law and the judicial judges the law. If the executive and the judicial may only execute and judge that which the

legislative makes, then is it not true that the limitations imposed upon the legislative branch by the Constitution (and particularly Article 1), are, *ipso facto*, limitations upon the executive and the judicial branches? Since the judiciaries were to judge of the Constitution as well as the laws of nations and the States, it became necessary that Section 2 of Article 3 be inserted so as to "*extend*", (not limit) "the judicial power of the United States," to the subjects over which the legislative branch was forbidden to legislate.

All we asked for in the court below, and all we ask for now is a "day in court" and a fair opportunity to defend the integrity of the judiciary and the Constitution. In doing so we will necessarily defend the sole effective means of preserving human liberty. It is a paradox that this question is now *directly* before the court for the first time in its history.

Question 4

Question 4 is answered by the same material that answers Question 3.

Question 5

Candor requires us to concede that Question 5 rides herd upon the court. The National Labor Relations Act purports to confer certain duties upon the National Labor Relations Board and purports to impose additional duties upon the emancipated judiciary. If it should be held that NLRB exercises no judicial functions, then obviously the mere transmission of its records to a Circuit Court of Appeals will not *ipso facto* convert the proceeding from a non-judicial to a judicial one. That is particularly true where the Courts of Appeals are made mere record clerks with the mere authority to make the solemn and cataclysmic pronouncement that, in the performance of its paltry

ministerial duties, it has found "substantial evidence" to support the findings of the Board.

The judiciary of the United States cannot be made the mere executioner of the orders of a non-judicial body.

Hayburn's Case, 2 Dallas 409;
U. S. v. *Ferreira,* 13 Howard 40.

Question 6

At the time of the adoption of the Fifth Amendment it was an essential of the law of the land and due process of law that all questions of fact litigated between governments and men should be decided either by an indifferent judicial officer, emancipated from control by the executive branch of government, or by an impartial and indifferent jury emancipated from control by any branch of government.

While the Judges of Rhode Island, Georgia, Pennsylvania and Connecticut were subjected to the control of the legislative branches of those States by the varying provisions of their fundamental laws, none of the American States at the time of the adoption of the Fifth Amendment authorized any servility of the judiciary to the executives of such States.

See, *The Constitutions of the Various States in Thorpe, Charters and Constitutions, alphabetically arranged in 7 Volumes.*

A principle of government won in the American Revolution, thus became the law of this land as embodied in Founding Charters of Every State, by the time of the adoption of the Fifth Amendment. The 29th Chapter of Magna Carta was used by Rhode Island Judges in the case of *Trevett* vs. *Weeden* to hold a tribunal servile to the Rhode Island Assembly unconstitutional in 1786. (Pamphlet by James M. Varnum, printed by John Carter at Providence 1787. Bates, Rhode Island and the Union, page 133).

The displacement of the Rhode Island judges, while the Constitutional Convention was getting under way in Philadelphia was ominous.

See, *Colonial and Constitutional History of the Emancipated Judiciary in America, American Bar Association Journal, July 1951.*

For holding that a tribunal in the Colony of New York, erected by Governor Cosby and made servile to his will, was unconstitutional, Chief Justice Lewis Morris, grandfather of Gouverneur Morris, was removed as Chief Justice of the Colony of New York. For his opinion in the case that led to his removal, see the *Opinion of Chief Justice Morris printed and sold by John Peter Zenger in Smith Street in 1733, New York Public Library.*

The principal "libel" for which an information was filed against John Peter Zenger because the Grand Jury (one of whom was an ancestor of Franklin D. Roosevelt) would not indict him, was the following which appeared in Zenger's Paper and in the information:

> "We see mens deeds destroyed, Judges arbitrarily displaced, New Courts erected without consent of the Legislature by which it seems to me, tryals by juries are taken away when a Governour Pleases . . .*Who is then in that Province that call any Thing his own, or enjoy any Liberty longer than those in the Administration will condescend to let them do it, for which Reason I have left it,* (the Province of New York) *as I believe more will".*
>
> *Rutherford, John Peter Zenger* (1941) pp. 67, 68.

We cite the argument of Andrew Hamilton in behalf of Peter Zenger for further authority on Question 6.

Rutherford, supra, 81 *et seq.*

Lewis Morris II, father of Gouverneur Morris paid a large part of Hamilton's fee for representing Peter Zenger. The remainder of the fee was paid by James Alexander and William Smith, Zenger's former Attorneys, who had been disbarred for filing a plea in his case similar to that embodied in the answer of Dalton Telephone Company in this case.

Gouverneur Morris and George Mason (one of whose ancestors narrowly escaped the halter of Governor Berkeley's servile tribunals, as an aftermath of Bacon's Rebellion in Virginia) are the men principally responsible for the federal judiciary being a co-ordinate branch of our government, with the non-delegable power to defend itself, the Constitution and human liberty against the assaults of power. It was old George Mason who refused to sign the Constitution because it did not give to the judiciary the weapons inherent in a Bill of Rights, with which to wage war on tyrants. It was he who established the emancipated judiciary in Virginia before the Declaration of Independence, and to whom we owe most of the liberties we now enjoy.

The History of the Emancipated Judiciary in America, supra.

QUESTIONS 7, 8, 9 and 10

A—Non-Communist Affidavit:

The Complaint and the Order of the Board were issued in violation of Sections 9 (f), (g) and (h) of the National Labor Relations Act, as Amended.

Sections 9 (f), (g) and (h) of the National Labor Relations Act, 61 Stat. 136, 28 U. S. C. A. 159, provide in substance, that no complaint shall issue by the National Labor Relations Board and no labor organization shall be eligible for certification as the representative of employees unless "each officer" of the "labor organization and any national

or international labor organization" of which it "is an affiliate or constituent unit shall have complied" with the above subsections of the Act, which are commonly known as the non-Communist affidavit provisions. The constitutionality of these requirements was upheld by this court in *American Communications Association* vs. *Douds*, 339 U. S. 382, 70 U. S. Ct. 674. It is clearly established, that the Act requires compliance by "each and every officer" of the labor organization involved at "each and every level", including compliance by the Local, its National and International affiliates. The Southern Federation of Telephone Workers, the Charging Union in this matter was dissolved prior to June 1947 and could not have, and did not comply with the requirements of Sections 9 (f), (g) and (h) at the time of the issuance of the Complaint in this matter. The exact date on which Southern Federation of Telephone Workers ceased to exist is in conflict. It is clear, however, that the Communications Workers of America issued a Charter to Southern Division 49 on June 8, 1947, and that Southern Federation was dissolved prior thereto.

The Southern Federation of Telephone Workers could not have complied after it ceased to exist. Therefore, the amended Charge of March 25, 1948 was filed and the Complaint dated March 26, 1948, was issued in the name of an organization which was not in compliance. Such complaint was a nullity. See *NLRB* vs. *Highland Park Mfg. Co.*, — U. S. —, —— L(Ed.) ——. Decided 5/14/51.

The Communications Workers of America Division 49 did not get into compliance with Section 9 (f), (g) and (h) until July 1949.

The Records of the National Labor Relations Board show that the Communications Workers of America did not file affidavits for its Board members and State Directors

until July 13, 1949. Prior records on compliance show affidavits filed only for its top officials.

Prior to July 13, 1949, the General Counsel for the National Labor Relations Board had ruled that certain additional Division officers of the Communications Workers Union must file the affidavits, and failing them, neither Division 49 nor the Communications Workers as the parent organization would be in compliance with Section 9 (f), (g) and (h).

The Order of the National Labor Relations Board in the matter was issued on April 11, 1949. This Order, *inter alia,* constituted a certification of a bargaining agent in violation of Section 9 (f), (g) and (h) of the National Labor Relations Act.

Since the Communications Workers of America alleges that it is the successor to the Southern Federation of Telephone Workers and since the Petitioner was therefore directed by the Board to bargain with Division 49, C. W. A., the Petitioner submits that the charges, the complaint and the Order of the National Labor Relations Board dated prior to compliance by Division 49 were issued illegally in violation of the provisions of Section 9 (f), (g) and (h) of the Act.

B—Successorship:

The Board's findings as to successorship between the Communications Workers of America, Southern Division 49 and the Southern Federation of Telephone Workers was made without affording the Petitioner an opportunity to be heard and in derogation of the Petitioner's right to a fair hearing and in a denial to this Petitioner of due process of law.

Paragraph 10 of the Petitioner's answer in the Court below directed the attention of the Court of Appeals to the denial to the Petitioner of due process of law as a result of

the National Labor Relations Board's having made an administrative determination in this case that the Communications Workers of America, Southern Division 49, affiliated with the CIO, is the legal successor to the Southern Federation of Telephone Workers, an independent Union, without notice to this Petitioner and without affording this Petitioner an opportunity to be heard or present evidence.

The practical significance of this ruling is that the Board certified, and the Court of Appeals has confirmed, that the Communications Workers of America, Division 49 is the legal bargaining agent of the Petitioner's employees, even though Petitioner's employees were never permitted to vote for or against it and no authorizations from the employees were ever submitted to Petitioner or the Board; a hearing was never held to allow any proof of representation. Nowhere in the Record is there a showing that the Communications Workers of America even *claim* that they have ever been authorized by any of Petitioner's employees to represent them.

The *ex parte* determination by the Board did not come to the attention of the Petitioner until after the filing of the Petition for Enforcement by the National Labor Relations Board. The Board, as shown by the petitioner's Answer in the Court of Appeals, made its determination of the legal status of the two organizations prior to the issuance of its complaint and its Order; however, at no time during the entire proceeding before the Board was this issue called to the attention of the Petitioner. Petitioner was never put on notice that this was even likely to be an issue or the basis of a finding during any of the proceedings before the Board. This conclusion of law was reached by the Board on the basis of evidence secretly furnished to the Board. Such action was in derogation of Petitioner's rights under the Administrative Procedures Act and a denial of

fair hearing and due process to Petitioner. The Petitioner has shown that the evidence on which the Board admittedly ruled was incomplete, misleading, and inaccurate.

The Record certified to the Court by the Board contains no evidence upon which a determination of legal successorship or other successorship by the Communications Workers of America to the Southern Federation of Telephone Workers could be based.

Such a determination by the Board is violative of the Administrative Procedures Act which provides:

> ". . . (a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law . . ." (5 U. S. C. A. 1004 (a); 60 Stat. 239).

The Petitioner called this illegality to the attention of the Board as soon as the facts were known to Petitioner. In this situation we submit that the decision of the United States Court of Appeals for the Ninth Circuit in *NLRB* vs. *American Potash & Chemical Co.,* 98 F. 2d 488, is pertinent. In that case the Court, citing *Morgan* vs. *United States,* 304 U.S. 1, set forth the doctrine that a litigant before an administrative body must be given an opportunity to present its case by reasonable notice of the charges he will have to meet, and an opportunity to present evidence and argument in meeting them. See *Berkshire Knitting Mills* vs. *N. L. R. B.,* 139 F. 2d 134 (3rd Cir.), in which the Court held that it would not enforce an order of the National Labor Relations Board directing an affirmative remedy as to certain persons not named in the Complaint without an opportunity having been given to

the Petitioner to present, at an appropriate time, any defense that it might have to such an order. See also *N. L. R. B.* vs. *Sands Mfg. Co.*, 306 U.S. 332 and *N. L. R. B.* vs. *Pittsburg Steamship Co.*, 95 L. Ed. 318, — U.S. —.

It is urged by the Petitioner that the finding of the National Labor Relations Board as to the successorship of the Communications Workers of America to the Southern Federation of Telephone Workers was violative of due process insofar as such determination was made without giving the Petitioner notice and an opportunity to be heard on this question; and that the Court below erred in directing the Company to bargain with the Communications Workers of America in the absence of any evidence in the Record certified to the Court to substantiate such a finding; moreover, that the Court below erred in directing the Petitioner to bargain with the Communications Workers of America, Southern Division No. 49, in the absence of a designation of that Union by the employees of the Company as their collective bargaining agent, either through a National Labor Relations Board election or otherwise, and at a time said Union was not in compliance with the requirements of Section 9 (f), (g) and (h), of the National Labor Relations Act. See *NLRB* vs. *Highland Park Mfg. Co., supra.*

QUESTIONS 11, 12, 13 AND 14

It is submitted that the Court below erred in failing to take the findings of fact and conclusions of law of the Trial Examiner into account in determining whether or not the findings of fact and conclusions of law of the National Labor Relations Board were supported by substantial evidence on the Record considered as a whole.

Petitioner shows that a Trial Examiner of the National Labor Relations Board who conducted the Hearing in this matter observed the witnesses, their conduct, their

demeanor and in the light of this person's observation, as well as the evidence in the Record, found that the Petitioner had not refused to bargain in good faith; that it had actually signed an agreement about which there was a meeting of the minds of the parties; that thereafter there was an impasse in connection with certain other matters which were in negotiation; that following the impasse that offers of the parties were withdrawn; that thereafter certain of the employees of the Petitioner engaged in an economic strike; and that thereafter the Union broke off negotiations by its failure to request another conference, after calling the strike to compel the Petitioner to accede to certain of its demands (R. 92, 96, 100, 111-115). It submits further that the substantial evidence in the Record considered as a whole does not establish that the Petitioner insisted as a condition precedent to collective bargaining or to the execution of any written agreement that the Union register under the Georgia statute (See 22-412, 22-414, 1933 Code of Ga.) but only insisted that the Union register as a condition of executing the specific agreement which was drawn by and insisted upon by the Union in its entirety; and which included a Union demand that the following Article VI, Section 1 be embodied therein:

> ". . . If any provisions of this agreement or any amendments thereto, or any of the applications of the provisions of this agreement to any person or circumstances are held invalid by any Federal or *State law,* or the 'final determination of *any court* or authority of competent jurisdiction, the remainder of this agreement or its amendments or the application of such provisions to persons or circumstances other than those as to which it held invalid, shall not be affected thereby" (Emphasis supplied).

The decision of this Court in Universal Camera Corporation vs. National Labor Relations Board holds:

". . . It is therefore difficult to escape the conclusions that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform . . ." (*Universal Camera Corporation vs. NLRB,* 95 L. Ed. 315 at p. 316).

It is submitted that the Court below erred in finding that the parties' reaching an "impasse in bargaining", constituted a refusal to bargain on the part of the Company in violation of the Act. The ruling that an impasse in negotiations is not a refusal to bargain has been made by this and other Courts. See—In Re: *N.L.R.B.* vs. *Algoma Plywood & Veneer Co.,* 131 F. 2d 602, 336 U.S. 301; *N.L.R.B.* v. *Remington Rand, Inc.,* 94 F. 2d 862 (C.C.A. 2); *N.L.R.B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 787 (C.C.A. 9); *N.L.R.B.* v. *P. Lorillard Co.,* 117 F. 2d 921 (C.C.A. 6); *N.L.R.B.* vs. *Jones & Laughlin Steel Corp.,* 301 U.S. 1.

Under the peculiar Georgia law invoked by the Union in its proposals,

"one who deals with an 'association' as a legal entity capable of transacting business, and in consequence receives from it money or other thing of value, is estopped from denying the legality of its existence or its right to contract".

Petty v. *Brunswick & Western Railway Co.,* 109 Ga. 666.

In the absence of registration, the qualified party is bound to the unqualified but the unqualified is not bound to the qualified. Only the individual representative of the unqualified whose signatures appear on the contract are personally bound by its terms.

State Farm Mutual Automobile Ins. Co. v. *Mackechnie,* 114 F. 2d, 728, 735.

Georgia courts do not apply the rule of estoppel to unincorporated associations, as was done in the *United Mine Workers* case, 259 U. S. 344.

The union insisted on unequality under Georgia law. The employer insisted on equality under Georgia law. Was such insistence, during the bargaining process, bad faith? If so, the United States Congress exercised the worst of faith when it amended the National Labor Relations Act, while bargaining was in process in this case, to require fuller disclosures of identity than petitioner was bargaining for. To rule that the conduct of petitioner evidenced bad faith, is to rule that the conduct of Congress reached a lower level of depravity. Good faith, like virtue, rest in the minds of men, and is not to be disentombed from statutes.

For the reasons assigned in the petition for certiorari and because of the facts and law set out in this brief, we respectfully submit that the writ of certiorari should be granted and that, after full consideration by this court, the judgment and decision of the United States Court of Appeals for the Fifth Circuit should be reversed and such further proceedings had as the Constitution and the law requires.

Respectfully submitted,

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